No. 80-1051

# In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE ANDERSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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## TABLE OF AUTHORITIES

Page

Cases:

*Beams* v. *United States*, 294 F. Supp. 1218, aff'd per curiam, 417 F. 2d 197 ..... 4

*Choteau* v. *Burnet*, 283 U.S. 691 ..... 4

*Commissioner* v. *Walker*, 326 F. 2d 261 ..... 3, 4

*Critzer* v. *United States*, 597 F. 2d 708, cert. denied, 444 U.S. 920 ..... 4

*Heiner* v. *Colonial Trust Co.*, 275 U.S. 232 ..... 4

*Holt* v. *Commissioner*, 364 F. 2d 38, cert. denied, 386 U.S. 931 ..... 2, 4, 5

*Fry* v. *United States*, 557 F. 2d 646, cert. denied, 434 U.S. 1011 ..... 3-4

*Jourdain* v. *Commissioner*, 617 F. 2d 507, cert. denied, No. 79-1985 (Oct. 6, 1980) ..... 3

*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 ..... 5

*Squire* v. *Capoeman*, 351 U.S. 1 ..... 3, 4

*Stevens* v. *Commissioner*, 52 T.C. 300, aff'd and rev'd on other grounds, 452 F. 2d 741 ..... 2

*Steward Machine Co.* v. *Davis*, 301 U.S. 548 .... 6

*Superintendent* v. *Commissioner*, 295 U.S. 418 ..... 3, 4

*United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 ..... 6

Statutes:

General Allotment Act of 1887, ch. 119, 24 Stat. 388 (25 U.S.C. 331 *et seq.*) ..... 3

Page

Statutes—Continued:

Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*) ..... 5

Section 5, 25 U.S.C. 465 ..... 5

Section 6, 25 U.S.C. 466 ..... 5

Section 16, 25 U.S.C. 476 ..... 5

Miscellaneous:

Rev. Rul. 56-342, 1956-2 Cum. Bull. 20 ..... 2

Rev. Rul. 62-16, 1962-1 Cum. Bull. 7 ..... 2

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The question presented in this federal income tax case is whether income earned by an Indian from ranching activities conducted on leased tribal land and land allotted to other Indians is exempt from federal tax.

Petitioner is a Sioux Indian enrolled as a member of the Fort Peck Tribes. He holds a grazing permit allowing him to graze cattle on a range consisting of 4,160 acres of land beneficially owned by 17 individual Indian allottees (of which petitioner is not one) and 640 unallotted acres beneficially owned by the tribe (II-R. 223).[1] During 1960-1966, the taxable years at issue, petitioner realized income from his cattle grazing activities on the range but did not file any

[1] "I-R." and "II-R." refer to the two-volume duplicated record filed in the court of appeals.

returns for those years or pay any tax with respect to such income.[2] Consequently, the Internal Revenue Service assessed income taxes and penalties against petitioner and thereafter instituted this suit in the United States District Court for the District of Montana to reduce the assessments to judgment.

The district court granted summary judgment for petitioner (Pet. App. 18-25). It held that exemption from tax for income generated by petitioner's cattle grazing activities was required for "the achievement of the Government's land use objectives" for Indians and to insure that the United States would "live up to its guardianship status" (Pet. App. 24, 25). The court of appeals reversed (Pet. App. 1-16). Relying on *Holt* v. *Commissioner*, 364 F. 2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967), and *Stevens* v. *Commissioner*, 52 T.C. 330 (1969), aff'd and rev'd on other grounds, 452 F. 2d 741 (9th Cir. 1971), the court of appeals held that no statute or treaty exempted from tax the income petitioner earned from cattle grazing operations conducted on land not allotted to him. It stated that considerations of "policy can create no federal income tax exemption when unaccompanied by express exempting language in a statute or treaty" (Pet. App. 13).

1. The court of appeals correctly held that petitioner's income from cattle grazing activities conducted on trust land not allotted to him was subject to federal taxation.

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[2]Petitioner's headquarters are located on 316 acres of trust land specifically allotted to him. Petitioner is also the beneficial owner of another 320 acres originally allotted to another Indian but later conveyed to him by deed. The government conceded below that the income petitioner derived from ranching activities conducted on these two tracts was exempt from federal tax (II-R. 223; Pet. App. 3-4). See Rev. Rul. 56-342, 1956-2 Cum. Bull. 20; Rev. Rul. 62-16, 1962-1 Cum. Bull. 7. The amount of petitioner's total income and the portion thereof allocable to these two exempt tracts is to be determined by the district court on remand (Pet. App. 14).

Like all other citizens, Indians are subject to federal income taxation unless exempt by statute or treaty. *Superintendent* v. *Commissioner*, 295 U.S. 418, 421 (1935). It is undisputed that no treaty or statute expressly exempts from taxation the income petitioner derived from cattle operations on leased trust land not allotted to him. Nevertheless, petitioner contends that such an exemption arises by implication under the General Allotment Act of 1887[3] as construed by this Court in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and that, consequently, the decision below is in conflict with *Squire*.

In *Squire* v. *Capoeman, supra*, the Court observed that the General Allotment Act guaranteed that lands allotted to the Indians and held in trust by the United States would eventually be delivered to them free and clear of all charges and encumbrances whatsoever. The Court construed this statute as exempting from taxation profits directly derived from land allotted to an Indian, provided the land was held in trust for him by the United States. Here, the government conceded that the income earned by petitioner on the 646 acres of trust land allotted to him or beneficially owned by him pursuant to an earlier allotment is exempt from taxation under *Squire* v. *Capoeman, supra*. But there is nothing in the General Allotment Act which exempts the income earned by petitioner on the 4,160 acres of trust land he leased under a grazing permit.[4] The federal government has not guaranteed to deliver the title of such lands to him free

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[3]Ch. 119, 24 Stat. 388 (25 U.S.C. 331 *et seq.*).

[4]The courts have consistently declined to interpret *Squire* as exempting from taxation income not directly derived from allotted land. See, *e.g.*, *Jourdain* v. *Commissioner*, 617 F. 2d 507 (8th Cir. 1980), cert. denied, No. 79-1985 (Oct. 6, 1980), and *Commissioner* v. *Walker*, 326 F. 2d 261 (9th Cir. 1964) (tribal official's salary paid out of revenues derived from land); *Fry* v. *United States*, 557 F. 2d 646 (9th Cir. 1977),

and clear of all charges and encumbrances. As to such lands, petitioner is no different from any other lessee of the lands, Indian or non-Indian. This Court has long held that an Indian's income is not tax-exempt merely because he is a ward of the United States and his property is held in trust for him. *Superintendent* v. *Commissioner, supra*, 295 U.S. at 421. As the Eighth Circuit observed in *Holt* v. *Commissioner, supra*, 364 F. 2d at 41, "[t]he taxation of the taxpayer's individual profit derived from his lease of tribal land cannot possibly represent a burden or encumbrance upon the tribe's interest in such land."

Moreover, as the court of appeals pointed out (Pet. App. 5), there is no merit to petitioner's suggestion (Pet. 7-10) that Indians, unlike other citizens, enjoy an implied exemption from federal income taxation. This Court has long held that Indians are subject to the income tax unless a treaty or statute has "clearly expressed" an exemption for some type of income. *Squire* v. *Capoeman, supra*, 351 U.S. at 6; *Superintendent* v. *Commissioner, supra*, 295 U.S. at 419-420; *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 234-235 (1927). Thus, this Court stated in *Choteau* v. *Burnet*, 283 U.S. 691, 696 (1931), that "[t]he intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." See also *Commissioner* v. *Walker*, 326 F. 2d 261, 263 (9th Cir. 1964): "Indians are subject to payment of federal income taxes * * * unless an exemption from taxation can be found in the language of a Treaty or Act of

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cert. denied, 434 U.S. 1011 (1978) (payments to Indian logger who worked on reservation land); *Holt* v. *Commissioner, supra* (profits received from ranching activities conducted on tribal land); *Critzer* v. *United States*, 597 F. 2d 708 (Ct. Cl.), cert. denied, 444 U.S. 920 (1979) (profits derived from operation of restaurant, motel and gift shop located on tribal land); *Beams* v. *United States*, 294 F. Supp. 1218 (E.D. Okla. 1968), aff'd per curiam, 417 F. 2d 197 (10th Cir. 1969) (income derived from the reinvestment of royalties).

Congress." Accord, *Holt* v. *Commissioner, supra*, 364 F. 2d at 40. In sum, there is no exemption in the absence of support in the language of a treaty or statute.

2. Nor are petitioner's profits from cattle operations on the leased land exempted from taxation by the provisions of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*). Section 16 of the Act, 25 U.S.C. 476, upon which petitioner relies (Pet. 15-18),[5] provides that if the members of a tribe choose to be governed by the Act, the tribe (or its tribal council) can "prevent the sale, disposition, lease or encumbrance of tribal lands." But a tax levied on income derived by an Indian from leasing activities conducted on lands not allotted to him cannot be considered as creating an "encumbrance" on tribal lands, and no court has so held. See *Holt* v. *Commissioner, supra*, 364 F. 2d at 41. At all events, petitioner cannot seek shelter under the Indian Reorganization Act because the Fort Peck Tribes, of which he is a member, specifically voted against the application of the Act (Pet. App. 11).

3. Finally, contrary to petitioner's claims (Pet. 18-20), he has not been denied equal protection of the laws. Congress acted well within its discretionary authority under the Constitution to make legislative classifications when it decided to exempt from tax income directly derived by an Indian from his own allotted land without also creating an exemption for income derived by an Indian from land allotted to

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[5]Petitioner also points to Sections 5 and 6 of the Act, 25 U.S.C. 465 and 466, in support of his claims (Pet. 10-15). But those sections merely provide for an exemption for certain lands from state and local property taxes (see *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-158 (1973)) and establish a general policy "in favor of efficient land use on Indian reservations" (Pet. App. 10). As the court of appeals noted (Pet. App. 8-10), neither of these provisions establishes a federal income tax exemption for the profits derived from activities conducted on leased trust land.

other Indians or from unallotted tribal land. See *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970). See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584 (1937).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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